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Supreme Court, U.S.

FILED

JUL 2 1987

JOSEPH F. SPANIOL, JR.  
CLERK

No. \_\_\_\_\_

# In the Supreme Court of the United States

OCTOBER TERM, 1986

FORD MOTOR CREDIT COMPANY, a corporation,  
*Petitioner,*

v.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON,  
*Respondent,*

and

JOHN STRIBLING FORD, INC., a corporation,  
*Real Party in Interest.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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### QUESTION PRESENTED

Whether a district court has authority to remand a properly removed case to state court on grounds not authorized by statute — i.e., elimination of the federal claim that formed the basis for removal — a question that divides the circuits and is pending before the Court in *Carnegie-Mellon University v. Cohill*, (No. 86-1021) *cert. granted*, 107 S. Ct. 1283, 94 L. Ed.2d 141 (1987).

**LIST OF PARTIES and RULE 28.1 LIST**

This is a petition for a writ of certiorari to review an order of the Court of Appeals denying an application for a writ of mandamus. Parties to the proceeding below were petitioner Ford Motor Credit Company, respondent The United States District Court for the District of Oregon, and the real party in interest, John Stribling Ford, Inc.<sup>1</sup>

Pursuant to Rule 28.1, petitioner Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. Ford Motor Credit Company has no subsidiaries whose stock is publicly traded. Ford Motor Company's affiliates are listed in Appendix G, *infra* at A22.

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<sup>1</sup> The caption of the Court of Appeals' Order denying the application for writ of mandamus included John Stribling as a real party in interest (A1). The real party in interest is the corporation, John Stribling Ford, Inc.

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UNITED STATES DISTRICT COURT  
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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Petitioner Ford Motor Credit Company (Ford Credit) respectfully prays for a writ of certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit entered April 3, 1987.

### OPINIONS BELOW

The Court of Appeals' Order of April 3, 1987 denying Ford Credit's Application for Writ of Mandamus has not been reported. A copy is attached as Appendix A, *infra* at A1.

The district court's Order of October 2, 1986 granting Stribling Ford's "conditional" motion to remand the underlying action to state court has not been reported. A copy is attached as Appendix B, *infra* at A2. The district court's Opinion of October 17, 1986 stating its reasons for granting the motion has not been reported. A copy is attached as Appendix C, *infra* at A4.

The Judgment of the district court entered October 17, 1986 remanding the underlying action to state court has not been reported. A copy is attached as Appendix D, *infra* at A19.

### JURISDICTION

January 7, 1987 petitioner Ford Credit filed an Application for Writ of Mandamus. A copy of material parts of the application is attached as Appendix F, *infra* at A21. The Court of Appeals denied the application on April 3, 1987 and Petitioner timely filed a petition for rehearing, which was denied on May 11, 1987. A copy of the order denying the petition is attached as Appendix E, *infra* at A20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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**STATUTES INVOLVED**

The statutes involved are 28 U.S.C. § 1441 and 28 U.S.C. § 1447. 28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section

1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the

State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

### STATEMENT OF THE CASE

#### 1. Proceedings in the District Court.

On September 5, 1984, John Stribling and the real party in interest, John Stribling Ford, Inc. (Stribling Ford), filed a complaint in the Klamath County Circuit Court for the State of Oregon against Ford Motor Company (Ford Motor) and petitioner Ford Motor Credit Company (Ford Credit), alleging violations of the Automobile Dealers' Day in Court Act (ADDCA), 15 U.S.C. §§ 1221 *et seq.*; Oregon securities laws; and state common law claims for breach of contract, conversion, and interference with a prospective business advantage. Defendants removed the case to the District Court for Oregon (CR 1) based on the ADDCA claims.<sup>2</sup> They invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1441(b) (CR 1 at 2).

On July 28, 1986, after nearly two years of litigation, the district court granted defendants' motions

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<sup>2</sup> References to CR identify the clerk's record in the removed action.

for summary judgment on both plaintiffs' claims against Ford Motor, on Stribling's claims against Ford Credit, and on Stribling Ford's securities law claims against Ford Credit (CR 59, 61, 85).

Ford Credit then moved for summary judgment on Stribling Ford's remaining claims against it, which consisted of the ADDCA claim and three state common law claims (CR 90). Stribling Ford then filed a "conditional" motion to remand the case to the state court if summary judgment were granted on the ADDCA claim, since only state law claims would then remain (CR 95). Ford Credit opposed the motion on the ground that the district court could not remand a properly removed case on grounds not authorized by statute and applicable statutes do not authorize the district court to remand a properly removed case to state court after the federal claim is disposed of (CR 91, 101; See A12; CR 112 at 8).

On October 2, 1986 the district court granted Ford Credit's motion for summary judgment on Stribling Ford's ADDCA claim, but denied it as to the remaining state law claims, and granted Stribling Ford's conditional motion to remand the case to state court (A2-3; CR 109).

In an Opinion dated October 17, 1986 the district court identified the question before it as "whether or not to exercise its discretion to retain a case that was properly filed in state court and removed to federal court by the defendant because a federal claim has

since been dismissed" (A13; CR 112 at 9). It discussed this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and noted the conflict in decisions of the courts of appeals (A14-15; CR 112 at 10-11). The court concluded that it had discretion under Ninth Circuit decisions to remand the case to state court, and that it should do so (A15-17; CR 112 at 11-13). The Court remanded the case to Klamath County Circuit Court (A19; CR 113).

## **2. Proceedings in the Court of Appeals.**

On January 7, 1987 Ford Credit filed in the Court of Appeals an Application for Writ of Mandamus directing the district court to vacate its order remanding the case to state court (A21).<sup>3</sup> On April 3, 1987 the Court of Appeals denied the application, on the ground that Ford Credit had not demonstrated that the district court "clearly erred in remanding pendent state claims after the federal claims permitting removal were decided" (A1).

Ford Credit timely filed a petition for rehearing, which the court denied on May 11, 1987 (A20).

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<sup>3</sup> On November 17, 1986 petitioner appealed from the district court's order of remand (CR 117). The Court of Appeals dismissed the appeal for lack of jurisdiction, holding that the court's order was reviewable only by mandamus.

Both plaintiffs have appealed from the judgment in favor of Ford Motor (CR 116), and Stribling has appealed from the judgment in favor of Ford Credit (CR 131). Those appeals have been consolidated and are pending in the Court of Appeals.



## REASONS FOR GRANTING THE WRIT

1. The question presented for review — whether a district court has authority to remand a properly removed case on grounds not authorized by statute — is pending before the Court in *Carnegie-Mellon University v. Cohill*, (No. 86-1021) cert. granted, 107 S. Ct. 1283, 94 L. Ed.2d 141 (1987).

On February 23, 1987 the Court granted certiorari in *Carnegie-Mellon University v. Cohill*, (No. 86-1021) cert. granted, 107 S. Ct. 1283, 94 L. Ed.2d 141 (1987), which presents the same question raised by this petition. The question presented in *Cohill* is:

Whether a district court has authority to remand a properly removed case to state court for a reason not set forth in 28 U.S.C. § 1447(c) — i.e., elimination, by amendment of the complaint, of the federal claim that had formed the basis for removal — a question as to which the circuits are split and as to which the appellate court below, sitting in banc, was evenly divided.

*Cohill* Petition at i.

This case is indistinguishable from *Cohill*. In *Cohill*, the plaintiffs alleged violations of state and federal law in an action filed in state court. Defendants removed the case to federal court based on the federal claims. Plaintiffs then amended their complaint to eliminate the federal claims and moved to remand the case to state court. The district court allowed the motion as an exercise of its discretion.



A panel of the Third Circuit concluded that the district court lacked jurisdiction to remand the case under *Thermtron Products, Inc. v. Hermansdorfer*, *supra*, 423 U.S. 336, which precludes the remand of a properly removed case except for reasons provided by statute. The *Cohill* panel directed the district court to vacate its order of remand; however, on rehearing *en banc* the full court denied the writ by an equally divided vote. This Court granted certiorari to review that decision.

In this case the district court adjudicated the federal claim on which its jurisdiction was based and then asserted discretionary authority to remand the remaining state law claims over which it had pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The two cases are indistinguishable, and both deserve review in resolving the important question before the Court.<sup>4</sup>

**2. The question presented for review is an important question of federal jurisdiction that this Court should decide, and which the Court of Appeals decided in a way contrary to a controlling decision of this Court.**

Whether a district court has authority to remand an action to state court on grounds not authorized by statute is an important and recurring question of fed-

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<sup>4</sup> In fact, this case is a stronger case for refusing to permit a remand than *Cohill* in that plaintiffs could assert the ADDCA claims in their pending appeals; but it is like *Cohill* in that they may abandon those claims in their effort to return to state court.

eral jurisdiction that has troubled the lower courts. See *Salveson v. Western States Bankcard Ass'n.*, 525 F. Supp. 566, 580, 581 n. 17 (N.D. Cal. 1981), *aff'd. in part, rev'd. in part*, *Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423 (9th Cir. 1984). It is also a question that this Court decided in *Thermtron Products, Inc. v. Hermansdorfer*, *supra*, 423 U.S. 336 in a way contrary to the Court of Appeals' decision. In *Thermtron*, the district court asserted discretionary authority to remand an action because its docket was overcrowded. This Court held in plain terms that district courts have no discretion to remand properly removed cases except on grounds provided by statute; Congress did not intend

"to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute."

423 U.S. at 351.

The petition should be granted, because the Court of Appeals has decided an important question in a way contrary to this Court's decision in *Thermtron*.

**3. The Court of Appeals' decision allowing the district court to remand a properly removed case to state court on grounds not authorized by statute conflicts with decisions of other circuits, and that conflict should be resolved by this Court.**

There is no doubt that, despite *Thermtron*, the Courts of Appeals remain sharply divided on the question presented for review. Cases in the Third,

Fifth, Seventh and Tenth Circuits follow *Thermtron* and hold that the remand of a properly removed case is limited to grounds specified in 28 U.S.C. §§ 1441(c) and 1447(c). Under those decisions, the district court must dismiss the state claims if it exercises its discretion under *United Mine Workers v. Gibbs*, *supra*, not to retain pendent jurisdiction. See *Browning v. Navarro*, 743 F.2d 1069, 1076 n. 21 (5th Cir. 1984); *Cook v. Weber*, 698 F.2d 907, 909-910 (7th Cir. 1983); *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982); *Sheet Metal Workers Intern. Ass'n., AFL-CIO v. Seay*, 693 F.2d 1000, 1002-1006 (10th Cir. 1982), *modified on other grounds on reh'g.*, 696 F.2d 780 (10th Cir. 1983); *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1133 (7th Cir. 1981); *In re Greyhound Lines, Inc.*, 598 F.2d 883 (5th Cir. 1979); *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 644 (5th Cir. 1978); *cf. IMFC Professional, Etc. v. Latin Am. Home Health*, 676 F.2d 152, 159-160 (5th Cir. 1982) (discretion to remand based on ancillary jurisdiction under federal officer removal statute, 28 U.S.C. § 1442(a)(1)).

The Second, Fourth, Sixth, and Eighth Circuits have held that properly removed cases may be remanded in the district court's discretion for reasons not prescribed by statute. See *In re Romulus Community Schools*, 729 F.2d 431 (6th Cir. 1984); *Fox v. Custis*, 712 F.2d 84, 89-90 (4th Cir. 1983); *Hofbauer v. Northwestern Nat. Bank of Rochester*, 700 F.2d 1197 (8th Cir. 1983); *Naylor v. Case & McGrath*,

*Inc.*, 585 F.2d 557 (2d Cir. 1978). The Ninth Circuit has also held that a district court has discretion to remand a case to state court when the federal claim is eliminated. *Wren v. Sletten Const. Co.*, 654 F.2d 529, 530 (9th Cir. 1981). Of these cases, only *Romulus* considers *Thermtron*. 729 F.2d at 436.

This serious and persistent refusal by roughly half of the courts of appeals to consider — much less follow — *Thermtron* has created a deep conflict among the circuit courts that this Court should resolve.

### CONCLUSION

The petition should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

June 30, 1987.

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## APPENDIX A

FILED

APR 3 1987

CATHY A. CATTERSON  
Clerk, U.S. Court of Appeals**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

FORD MOTOR COMPANY,	)	
<i>Petitioner,</i>	)	
vs.	)	
	)	No. 87-7029
UNITED STATES	)	
DISTRICT COURT FOR THE	)	DC # CV-84-
DISTRICT OF OREGON,	)	1291-BE
<i>Respondent,</i>	)	Oregon
and	)	(Portland)
	)	
JOHN STRIBLING,	)	ORDER
an individual, et al.,	)	
	)	
<i>Real Parties in Interest.</i>	)	

Before: WALLACE, ALARCON and NELSON,  
Circuit Judges

The petition for writ of mandamus is denied. Petitioner has not demonstrated that the district court clearly erred in remanding pendent state claims after the federal claims permitting removal were decided. *Levin Metals Corp. v. Parr-Richmond Terminal*, 799 F.2d 1312 (9th Cir. 1986); *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986); *Gallea v. United States*, 779 F.2d 1403 (9th Cir. 1985).

MoCal 3/23/87

## APPENDIX B

FILED

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Clerk, U.S. District Court  
District of Oregon**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

JOHN STRIBLING, an individual,	)	
and	)	
JOHN STRIBLING FORD, INC.,	)	
	)	Civil No.
<i>Plaintiffs,</i>	)	84-1291-BE
vs.	)	
	)	ORDER
FORD MOTOR COMPANY,	)	
a corporation, and	)	
FORD MOTOR	)	
CREDIT COMPANY,	)	
a corporation,	)	
<i>Defendants.</i>	)	

Defendant's motion for summary judgment on claim one, the Automobile Dealer's Day in Court Act (ADDCA) claim, is granted. Defendant's motion for summary judgment on the remaining claims, breach of contract, conversion and interference with prospective business relationships, is denied. Now, the federal claim has been dismissed and only state claims remain. Plaintiff's conditional motion to remand to state court is considered.

In determining the appropriate course of action,

I have considered the recent Third Circuit opinion, *Carnegie-Mellon University v. Cohill*, No. 85-3619 (3rd Cir. 1986) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). However, where all federal claims have been dismissed before trial, I find the law in the Ninth Circuit directs me to remand this case to state court. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), *Wren v. Sletten Construction Co.*, 654 F.2d 529 (9th Cir. 1981). Plaintiff's motion to remand to state court is granted.

Defendant's motion for summary judgment is granted on the ADDCA claim and is denied on the conversion, breach of contract and interference with prospective business relationship claims. Plaintiff's motion to remand to state court is granted.

The clerk is directed to enter final judgment under Fed. R. Civ. P. 54(b) on motions granted and denied on July 23, 1986.

Defendant's motion to compel answers to interrogatories is denied as moot.

A full opinion with reasoning will follow.

IT IS SO ORDERED.

DATED this 2 day of October, 1986.

/s/ ROBERT C. BELLONI  
United States District Judge



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

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BELLONI, Judge.

Defendant Ford Motor Credit Company moves for summary judgment on all four remaining counts against John Stribling Ford, Inc. If the motion is granted with respect to Count I, plaintiff moves to remand to state court. Defendant moves to compel answers to interrogatories.

John Stribling Ford, Inc. and John Stribling filed this action against Ford Motor Company and Ford Motor Credit Company (Ford Credit) in the Circuit Court of the State of Oregon for Klamath County. They alleged violation of the Automobile Dealers Day in Court Act ("ADDCA") 15 U.S.C. § 1221 (1982), breach of an implied covenant of good faith and fair dealing, conversion, intentional interference with a business opportunity and violation of Oregon's blue sky laws. Defendants removed to the United States District Court for the District of Oregon under 28 U.S.C. § 1441(b) (1982) alleging federal question jurisdiction under 28 U.S.C. § 1331 (1982).

On October 2, 1986, I issued an order in which I ruled on the motions discussed below. This opinion explains my reasoning.

#### **FACTS**

John Stribling Ford, Inc. (Stribling Ford) was established when the dealership entered into a Ford Sales and Service Agreement to be an authorized dealer on May 30, 1978. Stribling Ford refinanced

through the Small Business Administration (SBA) by pledging Stribling's personal real estate and dealership assets. The inventory was financed through Ford Credit. Ford Credit provided floor plan financing so that the vehicles themselves secured the financing. When a vehicle was sold, the dealership was to repay the unpaid balance secured by that vehicle. Ford Credit also retained a security interest in the dealership assets which had been created as security for the capital loan.

After Stribling Ford refinanced, Ford Motor Company advised that the dealership was undercapitalized. John Stribling and Stribling Ford were unable to borrow more money because all their assets were encumbered to provide security for the SBA loan and inventory refinancing. Stribling Ford lost \$405,000 in 1980, \$115,000 in 1981, and \$139,000 by August, 1982.

On September 7, 1982, Stribling Ford's check for a sold vehicle was returned unpaid to Ford Credit for nonsufficient funds. On September 13, 1982, Ford Credit received notice that a second check would be returned unpaid. The two checks totaled \$20,238.49. Ford Credit terminated its inventory financing and seized files and documents which were necessary for Stribling Ford to continue in operation. Stribling Ford closed on September 15, 1982 and John Stribling arranged to sell the dealership.

In order to transfer the franchise and assets to a new dealer, the sales and service agreement required

Ford's approval. Under the agreement, approval could not be unreasonably withheld and it further provided that Stribling Ford could demand that Ford purchase the inventory of new undamaged parts in return for a release from liability. Stribling executed the release and assigned the parts return privilege to the purchaser, Harvest Ford. At Stribling's request, Harvest Ford later waived the parts return privilege in order to facilitate Ford's approval for the transfer of the franchise and assets. Stribling needed the quick transfer of the dealership to prevent greater financial loss.

John Stribling and Stribling Ford filed this lawsuit alleging violation of the federal Automobile Dealers Day in Court Act (ADDCA), breach of an implied covenant of good faith and fair dealing, conversion, intentional interference with prospective business opportunity, and violation of the Oregon blue sky laws. Earlier, summary judgment was granted which removed John Stribling from the lawsuit for lack of standing, removed the blue sky claims and dismissed all claims against Ford Motor Company.

#### **SUMMARY JUDGMENT — ADDCA CLAIMS**

Summary judgment is appropriate when the moving party meets the burden of presenting evidence which demonstrates the nonexistence of any genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Addickes v. S. H. Kress*, 398 U.S. 144 (1970).

To be subject to the ADDCA, a defendant must be an automobile manufacturer and a party to the franchise agreement or, if not a party to the agreement, an agent of the manufacturer. 15 U.S.C. § 1221 (1982). The Ninth Circuit has adopted a narrow view of agency in this context and holds that a wholly owned subsidiary credit agency of an automobile manufacturer is not an agent for liability purposes under the ADDCA. *Marquis v. Chrysler Corp.*, 577 F.2d 624, 629 (9th Cir. 1978); *Stansifer v. Chrysler Motors Corporation*, 487 F.2d 59, 65 (9th Cir. 1973).

Here, the parties agree that Ford Credit is not an automobile manufacturer and not a party to the franchise agreement. Stribling Ford concedes that the Ninth Circuit view of agency, although narrower than some circuits, applies and that Ford Credit is not an agent under the ADDCA. Thus, defendant's motion for summary judgment as to the first claim is granted.

#### **SUMMARY JUDGMENT — OTHER CLAIMS**

Defendant moves for summary judgment on the claims of conversion, breach of contract and interference with prospective business advantage. Defendant generally argues that plaintiff cannot make a prima facie case on any of these claims and that with respect to the conversion claim, Stribling Ford released its claim.

#### **CONVERSION**

Conversion is "an intentional exercise of dominion or control over a chattel which so seriously interferes

with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Mustola v. Toddy*, 253 Or. 658, 456 P.2d 1004 (1969).

Here, Ford Credit argues that its actions in asserting its right to repossession of Stribling Ford's collateral do not amount to conversion. Ford Credit argues that by sending nonsufficient fund checks, plaintiff defaulted on loan obligations to Ford Credit and thus, Ford Credit had the right to the manufacturers' statements of origin, the titles and the autos. Alternatively, Ford Credit argues that Stribling Ford released any claims of conversion when it signed the release.

Plaintiff goes to great length in arguing that the nonsufficient funds check was not a default under the contract. And, if the check was a default, plaintiff argues that Ford Credit had no right to a self help remedy of repossession of the collateral and instead only had the right to the files, paperwork, inventory and keys to the cars.

Here, there is a genuine issue of material fact remaining. *Inter alia*, the parties dispute whether the nonsufficient funds check was a default under the contract and if it was, what type of self help remedy, if any, Ford Credit could use. Defendant's motion for summary judgment as to the conversion claim is denied.

**BREACH OF IMPLIED COVENANT**

Ford Credit argues that its exercise of rights pursuant to a written agreement cannot breach an implied covenant of good faith. Specifically, Ford Credit argues that each activity that plaintiff claimed breached the contract was expressly permitted under the terms of the contract.

Plaintiffs again argue that there was not a default under the terms of the contract. Thus, defendants treated them unfairly and specifically breached the implied covenant of good faith and fair dealing that Oregon contract law provides in every contract.

Here, as in the conversion claim, there is a genuine issue of material fact as to default. Defendant's motion for summary judgment on the breach of implied covenant is denied.

**INTENTIONAL INTERFERENCE WITH BUSINESS OPPORTUNITIES**

In order to establish intentional interference with a business opportunity, a plaintiff must "prove that the defendants intentionally interfered with its economic relationships, that they interfered for an improper purpose or used improper means and that, as a result, the petitioner was injured beyond the mere fact of the interference itself." *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979).

Here, plaintiff alleges that Ford Credit interfered with plaintiff's prospective business relations when



Ford Credit repossessed its collateral, sent a notice of private sale, cancelled it's inventory financing agreement, cancelled plaintiff's sight draft privileges and refused to release "capital reserve" funds and other collateral.

Defendant argues that none of these acts, alone or in combination were for an improper purpose nor by improper means. In addition, defendant argues that plaintiff defaulted and that it's actions were in accordance with the contract. Plaintiff, here too, argues that it did not default.

Here, questions of material fact remain. Again, the parties dispute whether a default occurred and thus do not agree on defendant's motives after plaintiff tendered the nonsufficient funds check. Defendant's motion for summary judgment on the intentional interference with business opportunity claim is denied.

#### **MOTION TO REMAND**

If defendant's motion for summary judgment is granted with respect to the single remaining federal claim, plaintiff moves to remand to state court. Plaintiff argues that there is no continuing federal jurisdiction over the state claims that remain. However, if the court finds that it has power to proceed to trial over the state claims, plaintiff urges the court to exercise it's discretion not to do so. Plaintiff argues that the state claims remaining are best left to state courts for resolution. Plaintiff cites *United Mine Workers v.*

*Gibbs*, 383 U.S. 715 (1966) and *Wren v. Sletten Construction Co.*, 654 F.2d 529 (9th Cir. 1981).

Defendant argues that *UMW v. Gibbs* does not require remand and cites *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) for the proposition that the federal court is not able to remand to state court except for statutorily stated reasons. Defendant argues that the recent case, *Carnegie-Mellon University v. Cohill*, No. 85-3619 (3rd Cir. August 29, 1986), is on point and persuasive.

The doctrine of pendent jurisdiction was discussed by the United States Supreme Court in *UMW v. Gibbs*. Pendent jurisdiction, in the sense of judicial power, exists when there is a substantial federal claim and the relationship between it and the asserted state claims permits the conclusion that the entire action before the court comprises one "case". *UMW v. Gibbs*, 383 U.S. at 725. The court stated that the doctrine is one of discretion and is justified by judicial economy, convenience and fairness to the litigants. *Id.* at 726. The court went on to say "(n)eedless decisions of state law should be avoided, both as a matter of comity and to promote justice between the parties, by procuring for them a sure-footed reading of applicable law." *Id.* And even more specifically, the court said "(c)ertainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.*

Here, a similar question of judicial discretion



arises. The case at hand is analogous because the court is deciding whether or not to exercise its discretion to retain a case that was properly filed in state court and removed to federal court by the defendant because a federal claim has since been dismissed.

The Ninth Circuit has considered a similar situation. *Wren v. Sletten*, 654 F.2d 529 (9th Cir. 1981). In *Wren*, former employees brought an action in Montana state court against their former employer to recover unpaid wages, overtime compensation and other monies under the Fair Labor Standards Act of 1938 and the Montana Wage Claim Act. The case was removed to federal district court. The federal claim was dismissed due to plaintiff's failure to exhaust arbitration and grievance procedures under the collective bargaining agreement. On appeal, the *Wren* court noted that the doctrine of pendent jurisdiction is one of discretion, not of power and is one which remains open throughout litigation. *Id.* at 536. The court did not find the argument for retention of jurisdiction by the district court persuasive and ordered the case remanded to the district court with directions to remand the state claims to the Montana state court. *See Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 681 n. 3 (9th Cir. 1980); *Cf. Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986) (district court has discretion, once the basis for 28 U.S.C. § 1442(a)(1) removal jurisdiction is dropped, to hear the rest of the action or remand it to the state court from which it was removed).

Defendant argues that the recent Third Circuit opinion, *Carnegie-Mellon University v. Cohill*, No. 85-3619 (August 29, 1986) is persuasive. In *Cohill*, the Third Circuit held that where a case was properly removed to federal district court, and the federal and state claims arise out of the same facts, the court cannot remand to state court after all the federal claims are dismissed. *Id.* Instead, if the trial court chooses not to exercise pendent jurisdiction, its only option is to dismiss the pendent claims, because there is no statutory basis for remand. *Id.* slip op. at 8.

*Cohill* relies on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and an earlier Third Circuit opinion. *Levy v. Weissman*, 671 F.2d 766 (3rd Cir. 1982). In *Thermtron* two residents and citizens of Kentucky filed an action in a Kentucky state court against an Indiana corporation and employee without office or place of business in Kentucky. Plaintiffs were seeking recovery for damages arising out of an automobile accident between plaintiff's automobile and defendant's employee's automobile. The Supreme Court held that the district court judge in the diversity case erred in remanding a properly removed case to state court because his docket was overcrowded. *Thermtron*, 423 U.S. at 345. Specifically, the Supreme Court held that the district court exceeded its authority in remanding a case on grounds not permitted by either 28 U.S.C. § 1441(c) or 28 U.S.C. § 1447(c). *Id.*

*Cohill* noted that the courts of appeals are divided over interpretation of *Thermtron*. *Cohill* slip. op. at 19-20. The Seventh, Tenth and Fifth circuits seem to interpret it as imposing a rigid rule that limits remand to grounds specified in the statute. (citations omitted) *Id.* However, the Sixth, Second, Fourth and Eighth Circuits have held that courts have discretion to remand a properly removed action when the federal causes of action have been removed from the complaint. (citations omitted) *Id.*

I find that the Ninth Circuit follows the latter interpretation and this court has discretion to remand a properly removed action to state court once the federal causes of action have been eliminated from the case. *Wren*, 654 F.2d at 536. In exercising discretion the court must weigh the advantages and disadvantages of remand by considering judicial economy, convenience and fairness to the litigants.

Defendant urges the court to retain the case under its discretion for reason of judicial economy and fairness. Specifically, defendant argues that the case has been here since 1984, all claims had a common nucleus of fact, plaintiff has benefited from using the liberal discovery rules, time and effort have been expended by the parties, the court is familiar with the case and the pretrial order is lodged. Finally, defendant argues that if the case is remanded to state court, the state court could not set the case for trial for several months.

Plaintiff argues that this is an appropriate case for remand because the federal claims have been dismissed before trial. According to plaintiffs, remand is not unfair in terms of discovery benefits to plaintiff because defendant chose to remove the case to federal court. Further, the completed discovery will continue to be a basis for the state action. Finally plaintiff notes that defendant chose the timing of the motions for summary judgment.

Here, only state claims remain. The state claims are in no way related to federal policy. All the federal claims have been dismissed prior to trial. As a matter of comity, needless decisions of state law should be avoided.

I find that any benefits plaintiff might have received from federal court discovery were a risk that defendant chose to face when defendant removed the action to federal court. Further, the discovery that has been completed can be used in state court proceedings.

Next, this court's familiarity with the case is in preparation of the prior motions and the motions before me now. Any judge's preparation for trial will be essentially the same, no matter whether the case is tried in federal court or state court.

The plaintiff chose to bring this action in Klamath County. This is a privilege that is available to a plaintiff in any lawsuit. At the request of the defendant the case was removed to federal court because of the

presence of federal claims. At the request of the defendant the federal issues have all been resolved in favor of defendant.

I find that defendant's concern on scheduling delay if the case is remanded to state court to be a significant concern. However, in this court, a postponement of trial is necessary because counsel for plaintiff has a trial in state court that is scheduled to be held at the same time as this trial and the state court has denied a postponement. I cannot say that a trial in this court could be held any earlier than it could be held in Klamath County.

I have weighed the advantages and disadvantages of remand to a state court in terms of judicial economy, convenience and fairness to the litigants. I find the weight to be in favor of remanding to the state court. This case is remanded to the Circuit Court of the State of Oregon for Klamath County.

#### **Motion to Compel Answer to Interrogatories and Objections to the Pretrial Order**

Defendant moves to compel plaintiff to answer two of its interrogatories. Defendant makes two objections to the pretrial order. Defendant's motion and objections are denied as moot.

**CONCLUSION**

By order on October 2, 1986, the following motions were ruled on. Defendant's motion for summary judgment on Count I, the ADDCA claim, is granted. Defendant's motion for summary judgment on the breach of contract claim, conversion claim and intentional interference with prospective business opportunity claim is denied. Plaintiff's motion to remand to state court is granted. Defendant's motion to compel answers to interrogatories and objections to the pretrial order are denied as moot.

DATED this 17 day of October, 1986.

/s/ ROBERT C. BELLONI

United States District Judge

A19

**APPENDIX D**

**FILED**  
OCT 17 11:08 AM '86  
Clerk, U.S. District Court  
District of Oregon

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

JOHN STRIBLING, an individual;	)	
and	)	
JOHN STRIBLING FORD, INC.,	)	
a corporation,	)	Civil No.
	)	84-1291-BE
<i>Plaintiffs,</i>	)	
vs.	)	JUDGMENT
	)	
FORD MOTOR COMPANY,	)	
a corporation; and	)	
FORD MOTOR	)	
CREDIT COMPANY,	)	
a corporation,	)	
<i>Defendants.</i>	)	

Based upon the order entered on October 2, 1986, and Opinion filed herewith, this case is remanded to the Circuit Court of the State of Oregon for Klamath County.

IT IS SO ORDERED.

DATED this 17 day of October, 1986.

/s/ ROBERT C. BELLONI  
United States District Judge

A20

APPENDIX E

FILED

MAY 11 1987

CATHY A. CATTERSON

Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY,	)	
<i>Petitioner,</i>	)	
vs.	)	
	)	No. 87-7029
UNITED STATES	)	DC # CV-84-
DISTRICT COURT FOR THE	)	1291-BE
DISTRICT OF OREGON,	)	Oregon
<i>Respondent,</i>	)	(Portland)
and	)	
	)	ORDER
JOHN STRIBLING,	)	
an individual, et al.,	)	
	)	
<i>Real Parties in Interest.</i>	)	

Before: WALLACE, ALARCON and NELSON,  
Circuit Judges

The petition for rehearing is denied.

MoCal 3/23/87



**APPENDIX F**

Material parts of Petitioner's Application for Writ of Mandamus, at 1:

"Pursuant to 28 USC § 1651 and Rule 21(a) Fed R App P, petitioner Ford Motor Credit Company applies for a writ of mandamus or, in the alternative, for a writ of prohibition, directed to respondent United States District Court for the District of Oregon.

"I.

*"Statement of Relief Sought*

"Petitioner requests that this Court direct the district court to vacate its order of October 2, 1986 (Ex A) and judgment of October 17, 1986 (Ex B) remanding to state court the case entitled *John Stribling and John Stribling Ford, Inc. v. Ford Motor Company and Ford Motor Credit Company* (docket number CV 84-1291-BE) or prohibit such remand." (Footnote omitted.)

## APPENDIX G

The following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of Ford Motor Company which are or may be affiliates of petitioner Ford Motor Credit Company: \*

*Subsidiaries:*

Anhanguera Leasing S.A. — Arrendamento  
Mercantil  
Bongotti S.A. Industria e Comercio de Radiadores  
Consortio Nacional Ford Ltda.  
Distribuidora Ford de Titulos e Valores  
Mobiliarios Ltda.  
Eik & Hausken A/S  
Escorts Tractors Limited  
Eveleth Taconite Company  
Excel Industries  
1st Nationwide Network, Inc.  
Ford Administracao e Consorcios Ltda.  
Ford Brasil S.A.  
Ford Credit A.B.  
Ford Credit A/S  
Ford Credit B.V.  
Ford Credit Bank Aktiengesellschaft  
Ford Credit N.V.  
Ford Credit S.A.  
Ford Distribuidora de Produtos de Petroleo Ltda.  
Ford Financiadora S.A. Credito,  
Financiamento e Inv.  
Ford Investitions-GmbH  
Ford Investitions GmbH & Co. oHG

\* Latest available listing, current as of April, 1987.

Ford Lio Ho Motor Company Ltd.  
 Ford Motor Company Aktiebolag  
 Ford Motor Company A/S  
 Ford Motor Company (Austria) K.G.  
 Ford Motor Company (Belgium) N.V.  
 Ford Motor Company of Australia Limited  
 Ford Motor Company of Canada, Limited  
 Ford Motor Company of New Zealand Limited  
 Ford Motor Company Private Limited  
 Ford Motor Company (Switzerland) S.A.  
 Ford Motor Credit Company of New Zealand  
 Limited  
 Ford Motor Norge A/S  
 Ford Nederlands N.V.  
 Ford Overseas Finance N.V.  
 Ford Sales Company of Australia Limited  
 Ford Versicherungs-Vermittlungs GmbH  
 Ford Versorgungs und Unterstutzungseinrichtung  
 GmbH  
 Ford-Werke Aktiengesellschaft  
 Fords Vagnskadegaranti A.B.  
 Hokkai Ford Tractor Co., Ltd.  
 Humboldt Mining Company  
 Oy Ford Ab  
 Quimica Parker, S.A. de C.V.  
 Saar-Industrie GmbH  
 Sao Francisco Maquinas e Ferramentas Ltda.

*Affiliates:*

Agromak, S.A. de C.V. (FTA)  
 Allied Tractor Limited  
 American Network, Inc.  
 Amim Holdings Sdn. Bld.  
 Assembly Plant Material Services, Inc.  
 Canapro S.A.R.L.

Carnegie Group Inc.  
 Carplastic, S.A.  
 Ceradyne Advanced Products, Inc.  
 Compania Financiera de Inversones y Credito S.A.  
 Conix Corporation  
 Double Eagle Steel Coating Company  
 Essex Manufacturing  
 Fabrica de Tractores Agricolas S.A.  
 Fairlane Woods Associates  
 FCP Finance Corporation  
 Foral Services Proprietary Ltd.  
 Ford Credit South Africa (Proprietary) Ltd.  
 Ford Vehicle Finance  
 General Electric Credit Auto Resale Service, Inc.  
 Halla Climate Control Corp.  
 Implementos Agricolas Mexicanos, S.A.  
 Iveco Ford Truck Limited  
 Kia  
 Mazda Motor Corporation  
 Metro Investment Service Corporation  
 Nascote Industries, Inc.  
 Nemak, S.A.  
 New Holland Japan Inc.  
 New River Casting Company  
 Otomobil Sanayii, A.S. (Otosan)  
 Oy - Ford Rahoitus Ab  
 Renaissance Center Partnership  
 Renaissance Center Venture  
 South African Motor Corporation (Proprietary)  
 Limited  
 Sukat Real Estate Holdings  
 Synthetic Vision Systems, Inc.  
 TG Ford Associates  
 Trans Canada Glass Ltd.  
 Thace  
 Vitro Flex, S.A.



3

No. 87-31

Supreme Court, U.S.

FILED

JUL 31 1987

JOSEPH F. SPANIO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1987

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FORD MOTOR CREDIT COMPANY, a corporation,  
*Petitioner,*

v.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON,

*Respondent,*

and

JOHN STRIBLING FORD, INC., a corporation,  
*Real Party in Interest.*

---

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

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11pp

**QUESTION PRESENTED**

The Real Party in Interest does not agree with the statement of the question presented by Petitioner. The question, more precisely stated, is: whether a district court has discretion to remand a properly removed case to state court after all federal claims have been eliminated on the motion of the party resisting remand, and when such remand will not waste judicial resources or unduly burden the parties with duplicative discovery or delay in trial date.

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In The  
**Supreme Court of the United States**  
October Term, 1987

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FORD MOTOR CREDIT COMPANY, a corporation,  
*Petitioner,*

v.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON,  
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and

JOHN STRIBLING FORD, INC., a corporation,  
*Real Party in Interest.*

---

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

Real Party in Interest, JOHN STRIBLING FORD, INC., respectfully prays that the Court deny Petitioner's writ of certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit entered April 3, 1987.

---

## OPINIONS BELOW

The Real Party in Interest adopts the Opinions below as set forth by Petitioner as accurate.

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## JURISDICTION

The Real Party in Interest adopts the Statement of Jurisdiction as set forth by Petitioner.

---

## STATUTES INVOLVED

The Real Party in Interest adopts the Statutes Involved as set forth by Petitioner.

---

## STATEMENT OF THE CASE

The Real Party in Interest agrees with the Statement of the Case as set forth by Petitioner.

---

## REASONS FOR DENYING THE WRIT

1. The present case does not pose the forum shopping problem of Cohill; here, the parties resisting remand themselves chose to eliminate the federal claims well before trial.

This Court has granted certiorari in *Carnegie-Mellon University v. Cohill*, (No. 86-1921) cert. granted 107 S. Ct. 1283, 94 L. Ed.2d 141 (1987), which presents the question

of “[w]hether a district court has authority to remand a properly removed case to state court for a reason not set forth in 28 USC Subsection 1447(c)—i.e., elimination, by amendment of the complaint, of the federal claim that had formed the basis of removal . . .” *Cohill* Brief at i.

*Cohill* raises the problem of forum shopping; the case at bar does not.

The plaintiffs in *Cohill* voluntarily amended their complaint to eliminate the federal claims and simultaneously moved for remand. These actions permit the inference that the plaintiffs may have wrongfully manipulated the forum in which the litigation would be conducted.

There is a long-standing policy against such manipulation because it wastes the resources and time of the judiciary and litigants. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 287 (1938).

In the present case, the federal claims were eliminated as a result of defendants’ motion for summary judgment, not some manipulation by plaintiff. Then, once those federal claims were dismissed, the district court, in remanding the case, simply followed the unequivocal policy elaborated in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), which requires that “needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *Id.*

In *Cohill* the policy requiring federal courts to avoid needless decisions of state law collides with the policy against allowing a party to manipulate pleadings and procedure in order to avoid or create federal jurisdiction. In

the instant case, there is no such policy conflict. Rather, the only policy issue was resolved in accordance with this Court's holding in *Gibbs* in that the district court decided not to retain jurisdiction.

Because *Gibbs* was not a removal/remand case, but one filed originally in federal court, the only alternative to the district court's retaining jurisdiction of the state claims in that case was dismissal. However, the policy and factors set forth in *Gibbs*—judicial economy, convenience and fairness to litigants—would support remand as well, under the proper circumstance. (The district court here expressly considered these factors and found that remand was clearly fair and efficient.) In fact, to require dismissal instead of remand would be a waste of the litigants' time and resources and a triumph of form over substance. See, e.g., *Wren v. Sletten Const. Co.*, 654 F.2d 529 (9th Cir. 1981).

**2. *Thermtron* did not reverse *UMW v. Gibbs*; the district courts still must exercise discretion to avoid unnecessary decisions of state law, sometimes leading to remands for grounds neither expressly authorized nor expressly prohibited by 28 U.S.C. Sec. 1447(c).**

Petitioner relies heavily on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), for the proposition that a case may only be remanded upon the grounds set forth in 28 U.S.C. Sec. 1447(c), specifically, cases "removed improvidently and without jurisdiction." This is an incorrect reading. Rather, *Thermtron* holds that cases so remanded are not reviewable under 28 U.S.C. Sec. 1447 (d) while cases remanded on other grounds are reviewable. *Id.* at 350.

While the Court in *Thermtron* did state that Congress probably never intended to extend “carte blanche authority” to the district courts on the issue of remand, *id.* at 351, it did not state that no other grounds for remand would be acceptable. It simply held that the ground given in *Thermtron*, i.e., an overcrowded docket as a basis for remand of both federal and state claims to state court, was reviewable, and upon review, unacceptable.

Circuit Court cases reading *Thermtron* as permitting remand only upon the grounds stated in 28 U.S.C. Section 1447(c), e.g., *Ryan v. State Board of Elections of State of Illinois*, 661 F.2d 1130 (7th Cir. 1983) and *Levy v. Weissman*, 671 F.2d 766 (3rd Cir. 1982), are factually similar to *Thermtron* in that the reasons given for remand were not grounded upon *any* proper authority. However, in a case where these were good reasons to remand, and the authority to remand was well-grounded in case law, the Fifth Circuit approved remand “based on clearly articulated authority.” *IMFC Professional, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982). As that Court said, abstention and pendent jurisdiction are two such authorities and “the discretionary element that inheres in [pendent jurisdiction] allows remand of non-federal issues.” *Id.* at 159.

The Fourth and Sixth Circuits also allowed remand upon the proper authority of pendent jurisdiction. *In re Romulus Schools*, 729 F.2d 431 (6th Cir. 1984) (remand proper in cases of pendent jurisdiction without reliance upon statute); *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983) (although the District Court is permitted to dismiss state claims once federal claims are dismissed, fairness and expediency permit remand to state court.)

The holdings in *IMFC*, *Romulus* and *Fox* are not in conflict with *Thermtron*; they are just factually dissimilar. The present case is akin to *IMFC*, *Romulus* and *Fox* in that remand was based on the district court's proper authority to exercise discretion in pendent jurisdiction situations.

---

O

### CONCLUSION

The Petition should be denied.

Respectfully submitted,

MICHAEL L. WILLIAMS  
*Counsel of Record for Real Party  
in Interest*

July 27, 1987.

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